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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 663

CHARLES E. GAY, Jr., Receiver of Savannah & Atlanta Railway,
Petitioner,

v.

MAJOR RUFF,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

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Savannah, Georgia,
For Petitioner.

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MAJOR RUFF,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case (R. 25), reversing the judgment of the District Court of the United States for the Southern District of Georgia (R. 11, 3 Fed. Supp. 264).

Jurisdiction

The judgment of the Circuit Court of Appeals to be reviewed was entered November 15, 1933 (R. 25). The jurisdiction of this court is invoked under §240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938; 28 U. S. C., §347 (a)).

Question Presented

The question is whether a suit against a receiver, appointed by a United States Court, in charge of the operation of a railroad, to recover damages from the receivership estate for the alleged negligent acts of his agents operating trains, is removable from a state to a federal court, under Judicial Code §33, as amended August 23, 1916, or whether the invoked section applies only to actions and proceedings brought against the receiver for official conduct where it is sought to hold him responsible in his own person or property.

Statute Involved

The pertinent language of Judicial Code §33, as amended by the Act of August 23, 1916, is:

> "When any civil suit or criminal prosecution is commenced in any court of a state against . . . any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer . . . said suit . . . may at any time before the trial or final hearing thereof be removed for trial into the district court

next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . ."

28 U. S. C., §76; R. S. §643 as amended.

Statement

Respondent, Major Ruff, brought suit for damages in a Georgia court against the receiver of the railway appointed by the District Court of the United States for the Southern District of Georgia in certain proceedings in equity, for the death of his son through the alleged negligent operation of a train on the line of railway.

The bill of complaint alleged, among other things, that the receiver was appointed by the United States Court, in the exercise of equity powers, and since appointment had been engaged in carrying on the business connected with the railway property, to-wit, the operation of the same as a railroad, and that, "while so engaged in operating said railroad property as said receiver, the said defendant injured and damaged the plaintiff by reason of the facts hereinafter alleged" (R. 1). The only prayer was for process, and while it does not expressly appear from the complaint that the judgment sought was asked against the receivership estate and not against the receiver personally, it is to be inferred that the estate only was to be bound.

The case was removed by the receiver to the district court of the United States for the Southern District of

Georgia, Augusta Division, within which the state court proceedings were pending, acting under authority of Judicial Code §33 as amended (R. 8).

Respondent's motion to remand was overruled, the district court holding, in view of the allegations and the decisions referred to in the supporting brief filed herewith, the receiver was "an officer of the courts of the United States," and that the action was "for or on account of an act done under color of his office or in the performance of his duties as such officer" (R. 11, 3 Fed. Supp. 264, 265). Thereafter the case was dismissed for want of prosecution (R. 17).

On appeal, the judgment of the district court was reversed, the United States Circuit Court of Appeals for the Fifth Circuit holding that while a receiver appointed by a United States court is an officer of the court, nevertheless Judicial Code §33 as amended applies only to actions and proceedings brought against a receiver personally, and has no application to cases brought against him in his representative capacity where a money judgment is sought to be recovered that will be paid out of the receivership estate. The court ordered the dismissal vacated, and the case remanded to the state court (R. 30).

Specific Assignments of Error to be Urged

The errors which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Fifth Circuit are:

1. The court erred in reversing the judgment of the district court, and in holding that Judicial Code §33 as amended applies to actions and proceedings brought against a receiver, i. e., an officer of the courts of the United States, only where it is sought to hold him responsible in his own person or property; and the court erred in holding that the section does not apply to cases brought against him in his representative capacity where, in case of a money judgment, it would be payable out of the receivership estate.

2. The court erred in holding that the section invoked by the receiver was without application to this suit, and that the remand was improperly denied and that the suit was improperly dismissed.

3. The court erred in reversing the case with directions to set aside the dismissal and to remand the cause to the state court.

Reasons for Granting the Petition

This case comes within the provisions of Rule 38 (5 b) of this court.

The Circuit Court of Appeals for the Fifth Circuit has here rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter. The Circuit Court of Appeals for the Eighth Circuit, Circuit Judge Sanborn writing the opinion, held in *Newell v. Byram*, 26 Fed. (2d) 200, 202, that a case of this character was removable under §33 of the Judicial Code, and that such removal has been

generally sustained in the courts of the United States since the decision of the cases of *Matarazzo v. Hustis*, 256 Fed. 882, 887, *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, 441, and *Berens, Jr. v. Byram, et al, Receiver*, 26 Fed. (2d) 953.

See also, in addition to cases cited by Judge Sanborn, *American Locomotive Co., et al, v. Histed*, 18 Fed. (2d) 656, *Newell v. Byram*, 18 Fed. (2d) 657, *Elliott v. Wheelock*, 34 Fed. (2d) 213, and *Snider v. Sand Springs Ry.*, 62 Fed. (2d) 635, 636. In Snider's case removal was allowed, and *Newell v. Byram, supra*, was cited apparently with approval by the Circuit Court of Appeals for the Tenth Circuit.

The Circuit Court of Appeals for the Fifth Circuit in this case has decided a federal question in a way probably in conflict with applicable decisions of this court, and particularly with the decision in *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, where, under similar circumstances, it is contended this court held that a suit against a receiver of a court of Alaska, and another, to recover money in a bank and certain property in the hands of the receiver, because of the wrongful acts of a predecessor receiver, was removable under §28 of the Judicial Code as supplemented by the amendment of §33 by the Act of August 23, 1916.

The Circuit Court of Appeals for the Fifth Circuit in this case has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, for that all the courts

of the United States having the question under consideration, with the single exception of District Judge Reeves of the Western District of Missouri, who held to the contrary in *Slover v. Chicago, M. & St. P. Ry. Co.*, 16 Fed. (2d) 609, have held that such cases are removable under Judicial Code §33 as amended, where the judgment recovered will be payable out of the receivership estate, and until the decision of the case at bar the practice of removal in cases of this kind has been uniformly recognized and followed throughout the country.

The Circuit Court of Appeals for the Fifth Circuit in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Many cases removed under the statute are pending in the federal courts at this time. They are scattered throughout the country, and their proper disposition is now involved in doubt, by reason of this decision. See, in this connection, petition for mandamus, rule nisi thereon returnable January 8th, 1934, and Brief in support thereof, Ex parte: in the matter of L. W. Baldwin and Guy A. Thompson, et al. petitioners, filed in this court on December 11th, 1933.

The result of the decision of the Circuit Court of Appeals for the Fifth Circuit is to leave this whole subject in considerable confusion. In the Eighth and Tenth Circuits, removal under identical facts apparently will be allowed. Before certain District Judges

in the Second Circuit, certainly as to those who agree with the opinion of District Judge Ray, of the Northern District of New York in *Matarazzo v. Hustis, supra,* removal of cases like this will be allowed, whereas among judges who agree with the reasoning of the Court of Appeals in this case removal will be denied, even though the facts in the several cases may be identical. In Circuits other than the Eighth, Tenth and Fifth, the District Judges hereafter will find themselves presented with conflicting decisions among the Circuits and the District Judges, and the proper interpretation of the statute will remain uncertain.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

December 1933.

ROBERT M. HITCH,
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For Petitioner.

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CHARLES E. GAY, Jr., Receiver of Savannah & Atlanta Railway,
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions of the Courts Below

The District Court's opinion will be found on pages 11 to 16 of the record and is reported in 3 Fed. Supp. 264. The opinion of the Circuit Court of Appeals (R. 25-30) has not been reported.

Jurisdiction

As stated in the petition, the judgment of the Circuit Court of Appeals to be reviewed was entered November 15, 1933 (R. 25). The jurisdiction of this court is invoked under §240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. §347 (a).

It may be suggested that under Judicial Code §28 as amended (28 U. S. C. §71) providing if the district court upon removal shall decide that a cause was improperly removed, and order it remanded, the remand shall be immediately carried into execution, and no appeal or writ of error from the district court allowed, or because the judgment of the Circuit Court of Appeals in this case is not final, this court is without jurisdiction to grant a writ of certiorari in this case; and *German National Bank v. Speckert*, 181 U. S. 405, and subsequent cases citing it, may be relied upon to support this argument.

If this argument should be advanced,—and opposing counsel have informed us they will so contend—we direct the court's attention to the fact that the *Speckert* and other similar cases, as well as Judicial Code §28, all deal with writs of error or appeals and not with writs of certiorari. Review was denied in the *Speckert* case because the order for remand was not a final judgment. That is all that was decided. By §6 of the Act of March 3, 1891, c. 517, 26 Stat. 828, which was then of force, the remedy of appeal or writ of error existed as a matter of right, where the matter in controversy exceeded $1,000.00 besides costs, only in cases not by the section made final, and as the law then stood such appeal or writ of error could only be taken from a final judgment. And this court held that an order of remand was not a final judgment. The writ of certiorari was not then available to the appellant, for it only issued in cases made final in the Circuit Court of Appeals by

the Act of March 3, 1891 (i. e., cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States, cases arising under patent, revenue and criminal laws, and admiralty cases). 26 Stat. 826; U. S. Comp. Stat. (1901), page 550. The controlling statutes, however, as to appeals, writs of error and writs of certiorari have been greatly changed since the *Speckert* case was decided. The case ruled nothing at the time as to the remedy of certiorari, and *a fortiori* it can not be considered as authority now when the statute granting the remedy of certiorari, as hereinafter pointed out, has been greatly changed.

As to the finality of the judgment, this question was put at rest, it seems to us, in *United States v. Gulf Refining Co.*, 268 U. S. 542, 544, 545. See also *American Construction Co. v. Jacksonville Ry.*, 148 U. S. 372, 385; *Forsyth v. Hammond*, 166 U. S. 506, 513. The words "in which the judgment or decree of the Circuit Court of Appeals is made final," etc., theretofore appearing in §240 of the Judicial Code, were stricken from it by the Act of February 13, 1925. Even before the Act of 1925, and while the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157, was of force, the judgment to be reviewed on certiorari only must have related to cases in which the Acts of Congress made the judgment of the court final, not necessarily to cases in which the court has rendered a final judgment (*American Construction Co. v. Jacksonville Ry., supra*, p. 384-5), but

under the law as it now stands the right of certiorari seems to exist in any case, civil or criminal, in a Circuit Court of Appeals, upon the petition of any party thereto, without regard to finality of judgment in either sense.

Under the Act of February 13, 1925, as now embodied in Judicial Code §240 (a), this court has power to "require by certiorari, . . . any case, civil or criminal, in a circuit court of appeals . . . upon the petition of any party thereto . . . either before or after judgment . . . be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Of course, the words "power and authority" and "with like effect" etc., qualify only the determination of the case on the merits after the certiorari is granted and were never intended to, and do not, qualify or restrict this court's power to grant the writ.

The statute with respect to no appeal or writ of error being allowed from an order remanding a case to the state court is part of §28, and not of §33, of the Judicial Code, and the privileges and proceedings under the two sections are quite different.

The statute forbidding an appeal or writ of error, as contained in §28 of the Judicial Code, in terms relates to orders of the district courts and not of the Circuit Courts of Appeal. The district court has not decided the case should be remanded; no order of remand has

been made. The Court of Appeals has merely directed that such order be entered. The statute, therefore, is not applicable.

And lastly, as stated, the statute with respect to this court's jurisdiction on certiorari was greatly altered and enlarged by the Act of March 13, 1911, c. 231, 36 Stat. 1087, 1157, and by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938.

It would be an anomalous situation if because of the statutory provision prohibiting an appeal or writ of error from the judgment of a district court remanding a case to a state court, removed under §28 of the Judicial Code (if that prohibition applies also to §33), this court found itself unable to settle the conflict between the different Circuit Courts of Appeals of the country as to the proper interpretation to be given to §33 of the Judicial Code as amended by the Act of August 23, 1916, quoted in the petition. It may be that mandamus will not lie, in a civil case of this character, to require the district court after removal and remand to retain jurisdiction (*Ex Parte Harding*, 219 U. S. 363; *Ex Parte Roe*, 234 U. S. 70; *Ex Parte Matthew Addy S. & C. Corp.*, 256 U. S. 417). Only where the exceptional character of the proceedings to be reviewed justifies and the absence of any other remedy is shown, will this court take jurisdiction under mandamus proceedings (*Maryland v. Soper*, 270 U. S. 9, 28).

If mandamus will not lie, and the judgment here can not be reviewed on certiorari, then, notwithstanding

the conflict of decisions in the different Circuit Courts of Appeals of the country, and the fact that the Circuit Court of Appeals has here probably failed to follow the decisions of this court and the weight of other authority, this court will have to wait until some case arises where jurisdiction has been retained in the United States Court under §33 of the Judicial Code and the plaintiff in the case after final judgment seeks a review (*Wilson v. Republic Iron Co.*, 257 U. S. 92); and, meanwhile, confusion must be allowed to go uncontrolled by the only court which can reconcile the conflicts.

Statement

A statement of the facts and of the questions presented and copies of the applicable statute will be found in the preceding petition.

ARGUMENT

That the petitioner is an officer of a United States court, and under the allegations of the complaint was carrying on his duties as an officer of the court in the conduct of the business of the railway at the time of the alleged wrong, was conceded in this case by the Circuit Court of Appeals. The court said this "goes, we think, without saying" (R. 26). The court, however, laying undue emphasis, we submit, upon *McNulta v. Lockridge*, 141 U. S. 327, and certain expressions in H. R. 776, 64th Congress, 1st session, when the amendment of August 23, 1916 to Judicial Code §33 was under consideration by the House of Representatives,

held the case was not removable because the action does not proceed against the receiver personally and there is no effort to hold him responsible for the alleged tort in his own person or property.

I.

The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

It is obvious that the decision in this case conflicts with that of the United States Circuit Court of Appeals for the Eighth Circuit in *Newell v. Byram*, 26 Fed. (2d) 200, in which the opinion was written by Circuit Judge Sanborn. In both cases suit was brought against a receiver of a railway for the alleged negligent acts of his agent in operating trains, judgments were asked against the receivership estate, the cases were removed from the state to the federal courts, motions to remand were made and denied in the district courts, and in one case the Circuit Court of Appeals held the case removable and in the other case that it was not. The argument adopted by Judge Hutcheson in the case at bar was advanced in the Newell case but was rejected in the following language:

> "It was the Congress of the United States that prescribed in §33 of the Judicial Code the terms and conditions of the removability of the action in hand. Neither court nor counsel may lawfully add to, subtract from or change those terms and conditions."
>
> *Newell v. Byram*, 26 Fed. (2d) 201.

The decision in this case probably also conflicts with the views of the Circuit Court of Appeals for the Tenth Circuit as indicated in *Snider v. Sand Springs Ry.*, 62 Fed. (2d) 635, 636. We recognize that so far as the reported decision shows no issue was made as to the right of removal in the *Snider* case. However, if the Circuit Court of Appeals for the Tenth Circuit had thought the case improperly removed, even in the absence of a motion to remand, the case should have been sent back to the state court under Judicial Code §37, 28 U. S. C. §80.

II.

The Circuit Court of Appeals for the Fifth Circuit has decided a federal question in this case in a way probably in conflict with applicable decisions of this court.

The case at bar seems to us controlled by *Barnette v. Wells Fargo Bank*, 270 U. S. 438. In that case the suit was originally brought in the state court against the receiver of a bank in Alaska, holding his appointment under an order from a United States court, to recover certain money in a bank and property charged to have been taken into possession by fraud and duress of a predecessor receiver. While the record was incomplete as to the ground of removal, this court, in the majority opinion, nevertheless said:

> "Such a suit was removable under §28 of the Judicial Code as supplemented by the amendment of §33 by the Act of August 23, 1916 c. 390, 39 Stat. 532. *Matarazzo v. Hustis*,

256 Fed. 882, 887-9; see *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 603; *Board of Commissioners v. Peirce*, 90 Fed. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska, with reference to land located in Alaska, in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court. *Rouse v. Hornsby*, 161 U. S. 588, 590."

Reference will be made hereafter to *Matarazzo v. Hustis*, cited apparently with approval by this court.

See *Rose's Federal Jurisdiction & Procedure*, (3rd ed), §383, p. 358.

The Circuit Court of Appeals in this case attempts to distinguish the Barnette case by suggesting that the majority opinion dealt with a purely "suppositious" case, and is, therefore, not binding as a precedent. It is said, "It can not be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver personally, or 'against the corporation in his name'." (R. 30).

The case can not be put aside so lightly. It is true it did not affirmatively appear on what ground the removal was sought, allowed and sustained in the *Barnette* case, but the majority opinion clearly shows (pages 440, 441) that the suit was for the surrender and cancellation of a deed to land and to recover money deposited by the receiver in a bank, joined as

party defendant, which was derived from rents and from a sale of some of the land. It is perfectly clear, it seems to us, that there was no effort to hold the defendant receiver liable in his own person or property. Whatever money judgment might have been recovered would have been payable out of the receivership estate or, if the funds in bank were not part of the receivership estate, the limit of the recovery would have been to subject the particular fund in controversy. There can certainly be no presumption that an effort was made to hold the successor receiver personally liable when the reported facts show all he did was to receive the money from his predecessor receiver, leave it in a bank, and hold certain deeds that were turned over to him by his predecessor.

Moreover, it was the duty of this court to examine into the question of jurisdiction of its own motion. *Chicago, Burlington & Quincy Ry. v. Willard,* 220 U. S. 413. Under Judicial Code §37, 28 U. S. C. §80, if it shall appear to the satisfaction of a district court at any time after a suit has been brought or removed thereto that jurisdiction is lacking the case shall be dismissed or remanded as the situation may require.

Matarazzo v. Hustis, a decision by District Judge Ray, of the Northern District of New York, reported in 256 Fed. 882, was cited apparently with approval by this court in the *Barnette* case, clearly showing that the holding of the majority opinion was not a purely "suppositious" one but that due consideration was given to the same reasoning the Circuit Court of Ap-

peals adopted in the instant case in support of a denial of jurisdiction. This court even refers to pp. 887-889 where Judge Ray discussed the history of the amendment of August 23, 1916 of §33 of the Judicial Code and where he concluded by saying:

> "A receiver appointed by the courts of the United States by this amendment was put on the same footing with officers created by statute and (the statute) was enacted because of conflicting decisions as to suits against receivers and their removability."

III.

The Circuit Court of Appeals for the Fifth Circuit in this case has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Before the amendment of August 23, 1916 of §33 of the Judicial Code the right of removal was limited to certain classes of officers, members of Congress, etc. By that amendment the same right of removal was given to "*any* officer of the courts of the United States for or on account of *any* act done under color of his office or in performance of his duties as such officer" (italics ours). That receivers appointed by a court of the United States are such officers, and that under the bill of complaint here the receiver was carrying out his duties as an officer of the court, is not disputed by

the Circuit Court of Appeals. The legislative purpose, as expressed in clear and unambiguous language in the amendment, was to place such officers of the courts of the United States in the same class and to grant to them the same right of removal that revenue officers, certain others, and members of Congress, theretofore enjoyed, for acts done under the color of their offices, or in the discharge of their official duties. It is a strange and strained interpretation of the words of the amendment to say that the right of removal depends upon who shall pay the judgment. It is hardly conceivable that Congress intended some suits against receivers for acts done under color of their offices or in the performance of their official duties might be removed, and other like actions brought against them in the same way might not, dependent only upon the party paying the price for the wrong. Suppose this had been a suit against a United States marshal, brought in a state court, to recover money in his hands arising from a sale of property under the revenue laws or an action of repelvin for property seized under such laws, could it be fairly argued that merely because he would not have to pay personally the amount of the recovery, the suit was not removable to the United States court? *Cleveland, etc. R. R. Co. v. McClung*, 119 U. S. 454; *Philadelphia v. Diehl*, 5 Wall. 720. If the argument would fail in a case like that against a marshal, why should it prevail in a suit against a receiver, admittedly an officer of a court of the United States, who, by the amendment of August 23, 1916, was given exactly the same right of removal that was

theretofore enjoyed by officers of the court acting by authority of the revenue laws of the United States?

The weight of authority supports the removal. In addition to *Barnette v. Wells Bank*, *Newell v. Byram*, *Matarazzo v. Hustis*, and *Snider v. Sand Springs Ry.*, supra, removal has been sustained under similar facts in the following cases:

American Locomotive Co., et al, v. Histed, 18 Fed. (2d) 656;
Newell v. Byram, 18 Fed. (2d) 657;
Elliott v. Wheelock, 34 Fed. (2d) 213.

The only decision of a court of the United States to the contrary was that of District Judge Reeves, of the Western District of Missouri, in *Slover v. Chicago M., & St. P. Ry. Co.*, 16 Fed. (2d) 609. This Judge later, recognizing the binding authority of *Newell v. Byram, et al*, of his own Circuit Court of Appeals, reluctantly receded from the position first taken by him and even went so far the other way as to hold than an action by an employee under the Federal Employers Liability Act against a federal receiver of a railway could be removed from a state court to a court of the United States, because he thought the amendment of 1916 of Judicial Code §33 impliedly repealed inconsistent provisions of the Federal Employers Liability Act. *Elliott v. Wheelock, supra.*

It will be found that *Matarazzo v. Hustis* and *Barnette v. Bank, supra*, have been consistently cited and followed as supporting removal in the cases mentioned,

without regard to the fact that final judgment would be payable out of the receivership estate and not out of the personal funds of the receiver.

In reaching the conclusion that suits against federal receivers in state courts are removable under Judicial Code §33 only when the proceedings are brought personally against the receiver and it is sought to hold him responsible in his own person or property, the Circuit Court of Appeals lays great emphasis on *McNulta v. Lockridge*, 141 U. S. 327, 331-2, in which it was incidentally said that if actions were brought against the receivership generally or against the corporation by name, in the hands of or in the possession of a receiver, without stating the name of the individual, it would more accurately represent the character and status of the defendant, as the receiver stands in the place of the corporation. The case then under consideration was an action against a receiver for acts of his predecessor, and the court was concerned with the Act of March 3, 1887 c. 373, 24 Stat. 552 (Judicial Code §66, 28 U. S. C. §125), permitting suits to be brought against receivers without previous leave of the court. That statute provides that such receiver may be sued in respect of any act or transaction "of *his* in carrying on the business connected with such property, without the previous leave of the court," and the argument was made that since it was not the act of the particular receiver of which complaint was made, the action would not lie. This court in discussing that contention said that the possession of the receiver was somewhat analogous to that of a corporation sole with respect to

which actions will lie by and against the actual incumbents for causes of action accruing under their predecessors in office. While for some purposes the receiver does stand in the place of the corporation, yet there are cases, i. e., foreclosure of mortgages covering specific property representing only a part of the mortgagor's assets, with ancillary receiverships, where the receiver only represents the corporation in so far as the mortgaged property extends. It is not accurate to say, therefore, that in all cases a chancery receiver stands in the place of the corporation for all purposes, and we respectfully submit that the McNulta case is not authority for cutting up actions against receivers and putting them in piles for removal purposes according to whether the judgment sought binds the receiver personally or only the receivership estate. No such question was before the court in the McNulta case.

The Circuit Court of Appeals also places great reliance on House Report No. 776, 64th Congress, first session, wherein it was said the proposed amendment of August 23, 1916 of Judicial Code §33, later enacted, was a recital of the old law with only one change. The change is quoted in the House Report, and that change is the statute which is now to be interpreted, viz., the addition of the words "or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer." We do not contend any change was made in the old law except by the addition of these words. The Committee report said, "The pur-

pose of the proposed amendment is *to extend the provisions* of §33 uniformly *to officers of the courts* of the United States not only in cases arising under the revenue laws but *in all cases*, giving to them the same protection *in all cases* now given to officers acting under the revenue laws, and to officers of Congress." (Italics ours). The court's duty to protect the property it administers is not diminished by its obligation to vigorously protect its officers performing their duties. As much reason to grant removal exists in the one case as in the other.

The amendatory statute gave the benefits of the section not only to receivers but to clerks of the court, United States commissioners and other officers while acting in the performance of their duties, and the enlargement of the class to be granted the right of removal seemed wise to Congress, according to the Committee Report, not only to provide for a more orderly method of procedure but to prevent the anomalous condition which then existed, which, according to the Committee, "could not be justified upon any line of reasoning," whereby certain officers performing their duty under revenue laws were entitled to removal while the same officers engaged in other duties not related to revenue laws were not entitled to the right of removal.

But whatever the committee report may have shown, the language of the amendatory statute is so simple and clear in its terms, extrinsic aid for interpreta-

tion is not needed. If there were ambiguity in the statute, and if the construction placed upon it by the Circuit Court of Appeals were not contrary to its plain terms, as we read it, perhaps the committee report might be of some aid to the Court. *United States v. St. Paul & M. Ry. Co.*, 247 U. S. 310, 318. But the language of the statute is positive and clear, and can not be argued away by attenuated theories of applicability only to some particular kind of case against receivers thereby excluding others not expressly or by clear inference withdrawn from its operation. Committee reports "can not be resorted to for the purpose of construing a statute contrary to the natural import of its terms. Their use is to 'solve, but not to create, an ambiguity.' If the language be clear it is conclusive. There can be no construction where there is nothing to construe." *U. S. v. Shreveport Grain & E. Co.*, 287 U. S. 77, 83.

The Circuit Court of Appeals is somewhat critical of Congress if the statute is to be given the interpretation claimed for it by us. It is said that Judicial Code §33 has no relation generally to removals (R. 27), though by its plain terms that is the only thing with which it is concerned. True, it provides for removal under a different form of procedure, and under different circumstances, from the general removal statute as laid down in Judicial Code §28, but it is nonetheless a removal statute. The lower court seems to think to give it the interpretation contended for by us would in some manner reflect upon Congress; that to so construe it

would "make an unsuspected breach in the removal laws, by hiding that breach away in a secret place" (R. 28). And the court says it seems "bizarre and fanciful to say that by an amendment of three lines, tucked away in a section of the Code related entirely to the removal of suits and transactions against revenue officers, etc., a section having no relation whatever to receivers nor even generally to removals, it was intended to make a secret breach in the removal laws." (R. 27). We are quite unable to get this point of view. Minds may differ as to whether Judicial Code §28 or §33 is the more appropriate place for an amendment like this, both sections dealing with removal of causes, but surely neither is a "secret place" and amending either creates no "unsuspected breach" in removal laws. To our way of thinking amending §33 was the right way to go about it, for Congress meant to enlarge the class of officers there enumerated who would be granted the right of removal, and did so, by plain and unmistakable language, in "*any* civil suit" commenced "in *any* court of a state" against "*any* officer of the courts of the United States" because "of *any* act done under color of his office, or in the performance of his duties as such officer."

The Circuit Court of Appeals seems to have been influenced also in this case by the thought that Congress is disposed to restrict federal jurisdiction, saying "for fifty years its policy has been to restrict, not to enlarge, federal jurisdiction" (R. 26). The fact is, however, that Judicial Code §33, which can trace its parentage

to the Act of March 2, 1833, 4 Stat. 633, originally designed to circumvent the so-called nullification statutes of South Carolina, from time to time as amended has greatly enlarged the jurisdiction of United States courts, and has taken in additional classes who might avail themselves of a right of removal; and the policy of the courts has been to give liberal construction to the provisions of the section. *Tennessee v. Davis*, 100 U. S. 257, 268; *Davis v. South Carolina*, 107 U. S. 597; *Maryland v. Soper*, 270 U. S. 9-10 (3); *Colorado v. Symes*, 286 U. S. 510, 517; *Ward v. Congress Construction Co.*, 99 Fed. 598, 604-605.

We have found no case construing this statute, except the Slover case already mentioned, where the distinction here made by the Circuit Court of Appeals has been recognized.

IV.

Conclusion

We think it sufficiently appears the questions presented in this case are of such a nature as to justify the assertion that the case comes within the provisions of paragraph 5 b of Rule 38, which states the considerations controlling in the matter of issuing writs of certiorari in cases like this, and it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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